BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIE HUNT	)	
Claimant	)	
	)	
VS.	)	
	)	
INTEGRATED SOLUTIONS, INC.	)	
Respondent	)	Docket No. 1,046,939
	)	
AND	)	
	)	
DALLAS NATIONAL INSURANCE CO. &	)	
ACCIDENT FUND INS. CO. OF AMERICA	)	
Insurance Carriers	)	

ORDER

Respondent and both its insurance carriers request review of the January 22, 2010 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes (ALJ).

ISSUES

The ALJ concluded that claimant established it was more probably true than not that he sustained an acute accidental injury arising out of and in the course of his employment on February 12, 2009, and that he continued to work for respondent until July 21, 2009. The ALJ also found that claimant gave respondent notice of that injury. The ALJ then ordered respondent to provide claimant with a list of three physicians from which claimant could select one to direct his care. The costs of the preliminary hearing were assessed against both insurance carriers, but the ALJ failed to designate which carrier would be responsible for the court-ordered benefits.[1]

[1] AFICA provided coverage up to June 28, 2009. Effective June 29, 2009 Dallas National Insurance Co. (Dallas) assumed coverage.

The respondent and both of its insurance carriers, Dallas National Insurance Co. (Dallas) and Accident Fund Ins. Co. Of America (AFICA) requested review of the ALJ's Order. Respondent (through both its carriers) contends the ALJ erred in her findings. Distilled to its essence, respondent and its carriers argue that claimant is dishonest and therefore, none of his testimony is to be believed. They go on to argue that the greater weight of the evidence, in the form of testimony from no less than 6 of respondent's employees, disprove and discredit claimant's assertions in this matter. Respondent (and its carriers) specifically deny that claimant sustained any injury at any time while in its employ and likewise failed to give timely notice of any such injury.

Respondent and AFICA alternatively contend that to the extent claimant has a compensable injury, the appropriate accident date is August 18, 2009, the date the written claim for compensation was served upon respondent.

Claimant argues that the ALJ's Order should be affirmed in every respect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Although the briefs submitted for this appeal suggest otherwise[2], the facts and circumstances surrounding this claim are straightforward and easily summarized. The ALJ's Order succinctly summarizes the testimony offered by the parties and rather than unnecessarily repeat those findings, this Board Member merely adopts the ALJ's recitation of the facts as her own.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[4]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5]

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[2] AFICA's Brief to the Board is 17 pages long while Dallas' brief is 32 pages long.

[3] K.S.A. 2008 Supp. 44-501(a).

[4] K.S.A. 2008 Supp. 44-508(g).

[5] K.S.A. 2008 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

In order to prevail, a claimant must also establish that he provided the statutorily required notice to his employer. K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Respondent seems to believe that because claimant has now admitted that he has a history of criminal convictions which he earlier denied, that his recitation of the events surrounding his alleged accident cannot be believed. This argument is further bolstered

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[6] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 899 P.2d 1058 (1995).

[7] *Id.*

by the fact that claimant's recollection of some of the events pertinent to his claim are admittedly "vague".[8] Nonetheless, this Board Member finds that the ALJ's conclusion that claimant met his evidentiary burdens in this matter are well reasoned and should be affirmed.

As noted by the ALJ, claimant's testimony as to his back injury on February 12, 2009 are corroborated by respondent's own witnesses.

> 1. Claimant was a forklift driver for respondent. On approximately February 12, 2009, claimant hurt his back while pulling a chip cart containing scrap metal into the aisle so that he could place it on the forklift. Claimant believed the chip cart pulling mechanism was faulty.
>
> 2. Claimant reported to respondent's administrative offices and requested an incident form to fill out. **The service manager [Al Tolbert] overheard claimant requesting the form. He and the safety manager [Ben Chavez] took claimant into a private conference room to discuss the matter.**
>
> 3. **Both the service manager and the safety manager admit that claimant verbally told them he sustained a back strain when pulling out the chip cart.**[9]

While it is true that at the conclusion of this meeting between claimant and Mr. Tolbert and Mr. Chavez, claimant declined to complete an accident report and declined any medical treatment, he nonetheless notified respondent of his accidental injury. As the ALJ noted, "[t]he fact that claimant declined medical treatment when he first gave notice does not negate his statement to two supervisors that he hurt his back at work while pulling on the chip cart."[10]

This Board Member concurs with the ALJ's analysis in this matter. Claimant certainly has a checkered past, has some issues with his attendance at work and his recollection of events as they relate to this claim is inconsistent at times. But the fact is that in February 2009 his employer conducted a training seminar educating its workers on the importance of informing respondent of any and all accidents. Respondent had even implemented an incentive program, rewarding employees if there were periods of employment where no injuries were reported.

On February 12, 2009, claimant was moving a chip cart, an item that is very heavy and is normally moved by a mechanical device, and sustained an injury to his back.

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[8] Claimant's Brief at 1 (filed March 15, 2010).

[9] ALJ Order (Jan. 22, 2010) at 1-2.

[10] *Id.* at 2.

Consistent with the company's policy, he attempted to fill out an accident report but was intercepted. According to claimant, he was segregated in a room and two of his supervisors began talking to him about what had just happened while moving the chip cart. Claimant also testified that they brought up the issue of his past absences. According to claimant, he was concerned that he might lose his job if he pursued this injury so he left the meeting without completing any accident report. Even so, those individuals acknowledge that in this meeting claimant told him he "tweaked something"[11] and suffered a "slight strain" when moving the chip cart.[12] This accident - which was characterized as a "near miss incident" - was memorialized in Ben Chavez's memo dated February 12, 2009.[13] Indeed, respondent concluded there was a design defect that was later cured, making the chip cart easier to move. Claimant may have rejected any offer of medical treatment during this meeting, but he nevertheless told his employer of the accident on the very same day he maintains he sustained injury.

Like the ALJ, this Board Member is persuaded by the testimony referenced above that claimant sustained an accidental injury on February 12, 2009. Similarly, this Board Member also finds that claimant provided timely notice of that injury, meeting with Mr. Tolbert and Mr. Chavez that same day. Accordingly, that aspect of the ALJ's Order is affirmed.

Respondent and AFICA contend the appropriate accident date in this matter is August 18, 2009, the date claimant filed his claim.[14] This contention is founded in the assertion that claimant has alleged a series of accidents commencing February 12, 2009 and continuing until his last date of work, July 21, 2009. It is unclear from the ALJ's Order if she found that claimant sustained a series of accidents or solely a single acute accident on February 12, 2009. The ALJ noted claimant's testimony that after February 12, 2009, "the more he worked, the 'worser it got'".[15] Moreover, claimant did testify that he never got better after February 12, 2009 and that he continued to move the chip cart while performing his regular work duties. Thus, there is some support in this record for the finding that claimant sustained a series of microtraumas, which would implicate the provisions of K.S.A. 44-508(d). Costs associated with the hearing were assessed against both carriers.

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[11] Chavez Depo. at 7.

[12] Tolbert Depo. at 17.

[13] Chavez Depo., Ex. 1.

[14] K.S.A. 44-508(d).

[15] ALJ Order (Jan. 22, 2010) at 2.

Regardless of the accident date, be it February 12 or July 21, 2009 (last date of work) or August 18, 2009 (date claim was filed), claimant provided timely notice (on February 12) of his injury. Admittedly, it seems unusual to conclude an injured employee gave notice of an accident that had yet to occur. Yet, that is a function of the legal fiction that results in cases of microtraumas and the terms of K.S.A. 44-508(d).

Although respondent and AFICA have invited the Board to alter the date of accident found by the ALJ, this Board Member finds there is no jurisdiction to do so. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

(1) Whether the employee suffered an accidental injury;

(2) Whether the injury arose out of and in the course of the employee's employment;

(3) Whether notice is given or claim timely made;

(4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.[16]

Often when presented with appeals from preliminary hearings, the Board will have to consider the date of accident issue in connection with the determination of whether the claimant provided timely notice. But in this instance, claimant's notice of his injury was timely regardless of which of the various potential accident dates is adopted. Thus, there is no jurisdiction to consider the ALJ's conclusions with respect to claimant's date of accident. Accordingly, that portion of respondent and AFICA's appeal is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[17] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

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[16] See K.S.A. 44-551.

[17] K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated January 22, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Gary K. Albin, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and Dallas National Insurance Co.
Matthew J. Schaefer, Attorney for Respondent and Accident Fund Ins. Co. of America
Nelsonna Potts Barnes, Administrative Law Judge